No. 79-577

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In the Supreme Court of the United States

OCTOBER TERM, 1979

JAMES DAMERON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The court of appeals affirmed without opinion (Pet. App.). The judgment of the district court is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 1979 (Pet. App. 23). A petition for rehearing was denied on September 11, 1979 (Pet. App. 24). The petition for a writ of certiorari was filed on October 9, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's Fourth Amendment rights were violated when police officers gained entry into his home, which was being held open for sale, under the pretext of being prospective home buyers.

2. Whether there was sufficient evidence to prove that petitioner committed a criminal attempt.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Kentucky petitioner was found guilty of attempting to manufacture, possess and dispense phencyclidine (PCP), a Schedule II controlled substance, in violation of 21 U.S.C. 841(a)(1) and 846. He was sentenced to five years' imprisonment to be followed by a special parole term of two years. The court of appeals affirmed without opinion (Pet. App. 23).

The evidence adduced at trial, which was uncontroverted, showed that the "Corbin Company"[1] placed an order with a chemical supplier for the purchase of an unusually large quantity of piperidine, a chemical essential to the manufacture of PCP. The order had been prepaid by cashier's check, rather than a check drawn on a corporate account (Tr. 210),[2] and the purchaser left only the telephone number and address of an answering service.[3] Alerted by the chemical supplier, DEA agents established surveillance near the shipping area of the supply company and awaited the arrival of the purchaser. A short time later, the agents saw petitioner arrive in a pick-up truck that had signs taped to each door bearing the name "Corbin Company." Petitioner, posing as "Jim Corbin", took delivery of the piperidine

[1]Investigation revealed that the "Corbin Company" was a fictitious corporation (App. 215).

[2]"Tr." refers to the trial transcript. "App." refers to the appendix filed by petitioner in the court of appeals.

[3]Petitioner, who tendered payment to the answering service in cash, had refused to divulge information normally given by a prospective customer (App. 137).

and drove off. A license plate check showed the plates to have been issued for a different vehicle. Following the vehicle, the agents saw petitioner pull off to the side of the road and remove the Corbin Company signs from the truck doors. Petitioner then removed the bogus license plate, which in fact was lost or stolen, replacing it with a plate bearing a different number. This plate was registered to petitioner (App. 197-204). The agents then followed petitioner to his home. DEA agents later confirmed that calls had been placed from petitioner's telephone to the telephone answering service used by the Corbin Company (App. 132, 133, 154).

Thereafter, two Flatwoods, Kentucky, police officers, who were working in cooperation with DEA agents, went to petitioner's residence, which was being held open for sale. Accompanied by a realtor, the two officers, both of whom were in uniform (App. 64-65), were admitted by petitioner to tour his house as prospective purchasers. During this inspection tour, the officers verified that cartons of piperidine were being stored in a closet in petitioner's house. (App. 63-64, 78-82).

A search warrant was then obtained to search petitioner's truck and residence. In the truck, the agents found a number of items substantiating that it was petitioner who had purchased the chemical piperidine posing as Jim Corbin of the Corbin Company (App. 230-239). During the search of petitioner's house, the agents seized the ten cartons of piperidine[4] (App. 243), as well as a number of documents, publications, and handwritten notes (App. 249-250). All of the various notes,

[4]A DEA expert testified that the quantity of piperidine purchased by petitioner would be sufficient to produce at least 12 million dosage-units of PCP and that each dosage-unit would sell for one dollar on the street (App. 206-214).

documents and publications related to the manufacture of PCP or to the surreptitious purchase of the piperidine (App. 250-277, 338-355). In addition, many of the seized items revealed the considerable planning in which petitioner had engaged to create the fictitious identity of Jim Corbin and the Corbin Company (App. 260-266).

Finally, it was learned that petitioner, who was a guard at a federal penitentiary, actively solicited information from the inmates concerning the manufacture of PCP. Thus, one prisoner advised petitioner to create a front-company to handle the purchase of piperidine, explaining that it was during the purchase of this indispensible chemical that drug traffickers frequently were caught (App. 109-111). Another inmate testified that he was asked by petitioner to secure a "kitchen formula" for manufacturing PCP (App. 118-121).[5]

ARGUMENT

1. Petitioner contends (Pet. 14-18) that his Fourth Amendment rights were violated when uniformed police officers gained entrance into his home under the pretext of being prospective home buyers. Because of this, petitioner claims that evidence of the officers' observation of piperidine, as well as the various items seized in the subsequent warranted search of his residence, must be suppressed as the fruit of the officers' illegal entry. In closely analogous situations, however, this Court has recognized that the Fourth Amendment is not violated when law enforcement officers fail to disclose or

[5]This "kitchen" method, as experts explained at trial, is the easiest and cheapest way to synthesize PCP. With this method, any reasonably intelligent individual who has a formula can manufacture PCP with no more equipment than plastic buckets (App. 212, 333-335).

misrepresent their status or motive in order to obtain consent to enter an otherwise constitutionally protected area. See *Lewis* v. *United States*, 385 U.S. 206 (1966); *Hoffa* v. *United States*, 385 U.S. 293 (1966).

In *Hoffa*, an informant who was an acquaintance of the defendant gave incriminating testimony based on information gained during his frequent visits to the defendant's hotel suite. Rejecting a claim that the defendant's consent was vitiated because the informant had not disclosed his actual role and purpose in making his visits, the Court stated (385 U.S. at 302; footnote omitted):

> [I]t is evident that no interest legitimately protected by the Fourth Amendment is involved. * * * [The informant] was in the suite by invitation, and every conversation which he heard was either directed to him or knowingly carried on in his presence. The petitioner, in a word, was not relying on the security of the hotel room; he was relying upon his misplaced confidence that [the informant] would not reveal his wrongdoing.

Similarly, in *Lewis*, a narcotics agent was invited into the defendant's residence after misrepresenting his identity and expressing a willingness to purchase drugs. Noting that at no time "did the agent see, hear, or take anything that was not contemplated * * * by petitioner," the Court held that it was not constitutionally impermissible for a government agent to use deceptive tactics to gain admission to a suspect's home, since "[a] government agent, in the same manner as a private person, may accept an invitation to * * * enter upon the premises for the very purposes contemplated by the occupant" (385 U.S. at 210-211). See also *United States* v. *Ressler*, 536 F. 2d 208, 211 (7th Cir. 1976).

Here, petitioner held his home open for sale, and the officers were invited into his home as prospective home buyers. Since the officers were uniformed, petitioner—unlike the defendants in *Hoffa* and *Lewis*—was not misled concerning the officers' identities, but only as to their purpose. Hence, he could easily have denied the officers entrance if he objected to their presence in his home.[6] See *Brown* v. *Brierley*, 438 F. 2d 954 (3d Cir. 1971). Nor was the officers' post-entry conduct violative of the Fourth Amendment, for they inspected no areas that petitioner could have assumed would not have been visible to persons he invited into his house to inspect it with a view to buying it. Thus, the realtor who escorted the two officers through petitioner's home testified that their conduct was what one might expect of prospective home buyers (App. 45). In particular, she explained that a realtor would normally expect a prospective buyer to open closets; and she indicated that once the closet door in question was open, the cartons of piperidine were clearly in view (App. 42, 45-46).[7]

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[6]This case is thus entirely different from *Bumper* v. *North Carolina*, 391 U.S. 543 (1968), where officers gained entry by a misrepresentation regarding their *official* right to be admitted.

[7]Because petitioner could expect that members of the public whom he invited into his home might see the items in question, the decision here is not, as petitioner contends (Pet. 15-17), at odds with this Court's decision in *Gouled* v. *United States*, 255 U.S. 298 (1921). As the Court explained in *Lewis* v. *United States*, *supra*, 385 U.S. at 209-210, *Gouled* involved a proper (albeit deceptive) entry that was rendered invalid when the invitee conducted a "secret and general ransacking" of the defendant's private papers.

The other cases relied upon by petitioner are equally inapposite. For instance, in *United States* v. *Phillips*, 497 F. 2d 1131 (9th Cir. 1974), government agents tricked their way into a building for the prohibited purpose of consummating a warrantless arrest of an individual without probable cause to believe that he was actually in the building. Unlike here, the agent's activities inside the building were in no way confined to the sort of conduct reasonably contemplated by the building's occupants. See *id.* at 1134-1135; cf. *Gouled* v. *United States*, *supra*. In *Gatewood* v. *United States*, 209 F. 2d 789 (D.C. Cir. 1953), police officers resorted to a forced entrance to gain admission into a residence after an attempt to gain entry by means of a ruse had failed (*id.* at 790). Finally, in *Fraternal Order of Eagles, No. 778* v. *United States*, 57 F. 2d 93 (3d Cir. 1932), the court invalidated a warrant which was predicated on information gained by prohibition officers who had previously secured entry into a private club by falsely representing themselves as members of the order, *i.e.*, not as members of the general public who could not be relied on to conceal violations from the authorities.

By leaving the cartons of piperidine in a place where they could readily be seen while his house was open to inspection by prospective purchasers, petitioner knowingly exposed their presence to outsiders and assumed the risk that it might be reported to government authorities. See *United States* v. *Guidry*, 534 F. 2d 1220, 1221-1222 (6th Cir. 1976) (upholding entry and plain view observations of an agent who was admitted as a repairman's "helper"); *State* v. *Anglada*, 144 N.J. Super. 358, 365 A. 2d 720 (1976) (entry gained and information about criminal activity elicited by officers posing as prospective home buyers). Because he did so, the officers' observation of the cartons cannot be characterized as the consequence of an unlawful search.[8]

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[8]In any event, there is no occasion to suppress the fruits of the warranted search, even assuming, *arguendo*, that the officers' entry and subsequent inspection of petitioner's residence were improper. Even before the officers' entry, law enforcement agents knew that petitioner had purchased a large quantity of piperidine through use of a fictitious identity, and that petitioner had driven his truck to his residence after he had picked up the piperidine. This information was more than sufficient to establish probable cause to search petitioner's house and truck, and the additional information gained through the officers' deceptive entry, which pin-pointed the piperidine's exact location in the house, added nothing significant to a determination of probable cause. Because of this, the search

2. Petitioner argues that his purchase of piperidine and accumulation of printed materials relating to the manufacture of PCP were, at most, merely preparatory to his engaging in any illicit drug operation. Therefore, he contends (Pet. 18-21), the evidence was insufficient to prove a criminal attempt under 21 U.S.C. 846.

Although we agree that preparation alone does not constitute an attempt, it does not follow that petitioner was required to have done every possible act short of actually beginning the manufacturing process in order to be liable under the attempt statute here. See generally *United States* v. *Coplon*, 185 F. 2d 629, 633 (2d Cir. 1950). Rather, as noted in *United States* v. *Stallworth*, 543 F. 2d 1038, 1040 (2d Cir. 1976), "Attempt is a subtle concept * * * that enables society to punish malefactors who have unequivocally set out upon a criminal course without requiring law enforcement officers to delay until innocent bystanders are imperiled." Accordingly, there is "fundamental agreement" that a punishable attempt occurs whenever a defendant acts with the requisite intent to commit the underlying offense and engages in conduct constituting a "substantial step" towards commission of the offense. See *United States* v. *Mandujano*, 499 F. 2d 370, 376 (5th Cir. 1974), cert. denied, 419 U.S. 1114 (1975). See also *United States* v. *Jackson*, 560 F. 2d 112, 117-121 (2d Cir.), cert. denied,

warrant and the subsequent seizures were valid at all events. See *United States* v. *Marchand*, 564 F. 2d 983, 993-994 (2d Cir. 1977), cert. denied, 434 U.S. 1015 (1978) (collecting cases); *United States* v. *Grunsfeld*, 558 F. 2d 1231-1241 (6th Cir.), cert. denied, 434 U.S. 872 (1977); cf. *Franks* v. *Delaware*, 438 U.S. 154, 156 (1978).

434 U.S. 941 (1977); *United States* v. *Stallworth*, *supra*, 543 F. 2d at 1040-1041; *Model Penal Code* §5.01(1)(c) (Proposed Official Draft (1962)).[9]

Petitioner does not dispute the intent element, and the evidence was otherwise sufficient to show that petitioner took a substantial step towards the manufacture of PCP. Thus, as we have detailed above (pages 2-3 *supra*), the evidence at trial showed that petitioner, acting through a fictitious corporation, purchased an extraordinarily large quantity of piperidine, a chemical for which there are few legitimate uses (see App. 326-355) and which is the rarest (App. 209-212) and most essential component of PCP (App. 310, 332). In addition, petitioner amassed a large number of notes and documents relating solely to the manufacture of PCP. An expert concluded that from the information contained in these materials, a knowledgeable person with access to the needed chemicals could synthesize PCP. More importantly, these materials could not be employed in the preparation of any other commonly known or commercially used substance (App. 355).[10] Finally, petitioner actively solicited information from prison inmates regarding the

[9]In *Jackson*, *supra*, 560 F. 2d at 119, the court recognized that

> [T]his formulation shifts the emphasis from what remains to be done * * * to what the actor *has already done*. The fact that further major steps must be taken before the crime can be completed does not preclude a finding that the steps already undertaken are substantial [quoting *Model Penal Code* §5.01, Comment at 47 (Tent. Draft No. 10, 1960).

Because the "substantial step" test is included as one of the alternative tests in the Model Penal Code's definition of attempt, petitioner's reliance on the Model Penal Code in his attack (Pet. 19) on that test is ill-founded.

[10]Petitioner, as a prison guard, could have had no lawful use for such an amount of piperidine. See *Model Penal Code*, *supra*, §5.01(2)(e).

surreptitious manufacture of PCP, including the acquisition of the "kitchen formula" with which petitioner would only need to employ ordinary household utensils to produce the illicit compound.

In short, by the time of his apprehension, petitioner had already taken the most significant steps towards the illegal manufacture of PCP by acquiring massive amounts of piperidine and the technical information needed to produce PCP. In these circumstances, petitioner's conviction under 21 U.S.C. 846 was wholly justified.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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